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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

10. 981194-CA

PROVO CITY CORPORATION,

Plaintiff / Appellee

vs.

DAVID G. CANNON,

Defendant / Appellant

Case No. 981194-CA

Priority No.2

BRIEF OF APPELLEE

APPEAL FROM THE FOURTH JUDICIAL COURT, UTAH COUNTY,
PROVO DEPARTMENT, FROM A CONVICTION OF CHILD ABUSE,
A CLASS A MISDEMEANOR, BEFORE THE HONORABLE GARY D. STOTT

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JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-2a-3(2) (e) (1992 as Amended).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the trial court erred in finding Cannon's actions in this case violated Utah's Child Abuse statute found in Utah Code Annotated Section 76-5-109? Statutory interpretation is a question of law reviewed for "correctness" with no particular deference accorded to the trial court. State v. Fixel, 945 P.2d 149, 151 (Utah App. 1997).

CONTROLLING STATUTORY PROVISIONS

The text of the Utah Code Annotated Section 76-5-109 is set forth in Appellant's Addenda.

STATEMENT OF RELEVANT FACTS

Angel Ivins and Penny Cooper lived on the second floor of the same apartment complex located at 401 North and 900 East. (Tr. at 4-6, 11-12). On March 13, 1996 the two women

independently observed Cannon on the third floor from their second floor locations. (Tr. at 7, 14). From her position, Angel Ivins observed Cannon, "hanging Malcolm over the rail." (Tr. at 8). When asked what she meant by hanging Malcolm over the rail, Angel Ivins responded that Cannon was "literally just hanging him over" the rail. (Tr. at 9). Furthermore, Angel Ivins testified that there was nothing underneath the baby as he was being hung over the railing. (Tr. at 9).

Penny Cooper similarly described the same event in her testimony at trial. She also observed Cannon hang Malcolm over the railing for a few minutes. (Tr. at 14). Penny also testified that she was not sure if Malcolm was still a chronic asthma patient. (Tr. at 16). Lastly, when asked to describe Malcolm's physical condition at the time of the incident Penny indicated that Malcolm, "looked pretty scared." (Tr. at 16).

Both women testified that when Cannon's wife yelled at him to stop what he was doing, Cannon did stop and pulled Malcolm back from over the rail. (Tr. at 9, 15).

SUMMARY OF THE ARGUMENT

The plain language and the intent of the child abuse statute confirm the fact that the trial court correctly interpreted Utah Code Annotated Section 76-5-109 when it held that Cannon violated the statute by hanging a nine month old child over a third story railing for a few minutes.

ARGUMENT

POINT I

PLAIN LANGUAGE

The plain language of the statute indicates that Cannon did, in fact, commit child abuse. The pertinent part of Utah Code Annotated Section 76-5-109 reads as follows:

76-5-109. Child abuse.

(1) As used in this section:

(a) "Child" means a human being who is 17 years of age or less.

(b) "Physical injury" means an injury to or condition of a child which impairs the physical condition of the child, including:

(i) a bruise or other contusion of the skin;

(ii) a minor laceration or abrasion;

(iii) failure to thrive or malnutrition; or

(iv) any other condition which imperils the child's health or welfare and which is not a serious physical injury as defined in this section.

Physical injury, as defined by the statute, can take many forms. The plain language of the statute indicates that a physical injury goes beyond cuts, bruises, and malnutrition. Specifically, the Legislature provided that "any other condition which imperils the child's health or welfare" qualifies as physical injury.

The facts of the case are undisputed. Cannon held a nine-month-old baby beyond a balcony railing thirty feet in the air. In such a condition, the baby's health or welfare were plainly imperiled. Cannon contends that the statute requires that the child's physical condition be impaired before child abuse can occur. The fact is the baby's physical condition was impaired, even under the definitions utilized by Cannon.

As Cannon points out in his brief, *Merriam Webster's Collegiate Dictionary, Ninth Edition*, defines "condition" as "a state of being." The baby's physical condition, or state of being, was that of being suspended thirty feet in the air out beyond a third floor railing. Cannon then cites *Webster's* definition for "to impair" as "to damage or make worse by." (Appellant's Br. at 7). Unquestionably, the baby's physical condition had been "made worse by" being suspended thirty feet in the air out beyond a third floor railing, rather than being held safely away from the edge.

Furthermore, the "impair" language comes from subsection (1)(b) under the definition of physical injury. In order to properly understand the full import of the definition of physical injury, and the use of the word "impair" in the statute, subsections (1)(b)(i) through (1)(b)(iv) must be read as well. Specifically, (1)(b)(iv) expands the definition of physical injury to include "any other condition which imperils the child's health or welfare." With this language the Legislature broadly defined child abuse beyond the alleged "impairment" requirement put forth by Cannon. Such a reading would thwart the legislative intent of the child abuse statute.

POINT II

INTENT OF THE LEGISLATION

The Court's primary responsibility in construing legislation is to give effect to the intent of the Legislature. Christensen v. Industrial Commission, 642 P.2d 755, 756 (Utah 1982). Furthermore, this court in State v. Jones, 55 Utah Adv. Rep. 60, 735 P.2d 399, 402 (Utah Ct. App. 1987), quoted the Utah Supreme Court as follows:

one of the fundamental rules of statutory construction is that the statute should be looked at as a whole and in light of the general purpose it was intended to serve; and should be so interpreted and applied as to accomplish that objective. In order to give the statute the implementation which will fulfill its purpose, reason and intention sometimes prevail over technically applied literalness. Andrus v. Allred, 17 Utah 2d 106, 109, 404 P.2d 972, 974 (1965).

In State v. Jones, 55 Utah Adv. Rep. 60, 735 P.2d 399 (Utah Ct. App. 1987), this Court addressed another child abuse case. In the Jones case, the defendant was convicted of child abuse and appealed. Jones argued that section 1(c) defined "serious physical injury" in terms of "any physical injury which creates a substantial risk of death." Jones equated "any" with "one," and argued that since not one of the occurrences created a substantial risk of death, Jones

could not be guilty under the statute. Id. at 401.

In responding to this contention, this Court explained the purpose of the act. Specifically, this Court stated, "To limit the definition of "serious physical injury" to one individual "injury" in the literal sense would thwart the major purpose of the act, *which is to curb the increase in child abuse by imposing stiffer penalties on child abusers.*" Id. at 402. (emphasis added). Moreover, this Court explained that, "the Legislature has provided in the child abuse act a definition which is *expansive and clear.*" Id. at 402. (Emphasis added). Consequently, the District Court, when it held that Cannon violated the statute, correctly construed the legislation to give effect to the expansive and clear intent of the Legislature.

Furthermore, Utah Code Annotated Section 76-1-106 reads as follows:

The rule that a penal statute is to be strictly construed shall not apply to this code, any of its provisions, or any offense defined by the laws of this state. All provisions of this code and offenses defined by the laws of this state shall be construed according to the fair import of their terms to promote justice and to effect the objects of the law and general purposes of Section 76-1-104. Utah Code Ann. § 76-1-106 (1973).

The Honorable Gary D. Stott correctly interpreted the child abuse statute when he held that, "the activity of the defendant with respect to the minor child that has been testified to created a condition which imperiled the child's health or welfare, which under the section, would be defined as a physical injury." (Tr. at 24-25). To construe the statute otherwise would mean abandoning the directive of Section 76-1-106, which is to construe the criminal statutes "according to the fair import of their terms to promote justice and to effect the objects of the law."

Accordingly, Provo City respectfully requests this Court to uphold the District Court's interpretation of Utah Code Annotated Section 76-5-109 and the conviction of Cannon for child

abuse.

CONCLUSION AND PRECISE RELIEF SOUGHT

Both the plain language and the intent of the statute indicate that the District Court correctly interpreted Cannon's actions to be in violation of the child abuse statute. Accordingly, Provo City respectfully requests this court to uphold the District Court's conviction of Cannon for child abuse.

DATED this 17 day of February, 1999.


VERNON "RICK" ROMNEY
Counsel for Appellee

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing Brief of Appellee to Thomas H. Means, Aldrich, Nelson, Weight & Esplin, 43 East 200 North, P.O. Box "L", Provo, Utah, 84603-0200 this 17 day of February, 1999.

